91-1956

Supreme Court, U.S.
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NO.____

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

JERRY ALLEN LeQUIRE,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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ISSUES PRESENTED

I. Whether the Double Jeopardy Clause of the Fifth Amendment bars prosecution for racketeering and continuing criminal enterprise offenses in the face of prior drug prosecutions involving the same conduct and where the alleged enterprise does not extend beyond that conduct.

II. Whether RICO and CCE prosecutions are barred by a defendant's belief that an earlier plea agreement for drug offenses involving the same transaction barred subsequent prosecution.

III. Whether RICO and CCE prosecutions are barred by the unreasonable delay in charging said offenses.

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UNITED STATES OF AMERICA,
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PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT
OF APPEALS FOR THE ELEVENTH CIRCUIT

The petitioner, Jerry Allen LeQuire, respectfully requests this Honorable Court grant the petition for writ of certiorari.

OPINION BELOW

The opinion of the court below is reported at 943 F.2d 1554 (11th Cir. 1991), rehearing denied, No. 89-7155 (11th Cir. March 4, 1992). The decision of the United States District Court for the Middle District of Alabama (Hobbs, J.,

presiding), dated November 18, 1988, denying petitioner's motion to dismiss is attached hereto as Appendix B.

JURISDICTION

The decision of the court below was entered on October 17, 1991 (Appendix A). Petitioner filed a petition for rehearing and rehearing en banc, which was denied on March 4, 1992 (Appendix C). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1). The petition is filed within ninety days of the denial of rehearing. Supreme Court Rule 13.4.

CONSTITUTIONAL PROVISION INVOLVED

FIFTH AMENDMENT

"[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb; . . . nor be deprived of life, liberty, or property, without due process of law; . . ."

STATEMENT OF THE CASE

On August 3, 1983, a substantial quantity of cocaine was seized by federal authorities at Dannelly Field in Montgomery, Alabama. In January, 1984, petitioner was charged in the United States District Court for the Middle District of Alabama in a four-count indictment arising directly out of the August 3, 1983 importation. On April 23, 1984, petitioner pled guilty to two counts of possession and importation of cocaine.

On July 29, 1988, petitioner and numerous codefendants were charged in the ten-count indictment in the Middle District of Alabama that is the subject of this petition. Petitioner was charged with conspiracy to violate the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961, et seq. ("RICO"), a

substantive violation of RICO, four counts of engaging in a continuing criminal enterprise, 18 U.S.C. § 848 ("CCE"), and four substantive counts (Counts VII, VIII, IX and X). The RICO and CCE counts alleged a drug smuggling operation including and concluding with the August 3, 1983 importation. Indeed, petitioner was arrested in August, 1983.

Petitioner was convicted of the RICO and CCE counts but was acquitted of the four substantive offenses charged in Counts VII through X. He was sentenced to a total of sixty years and fined $500,000.00.

Prior to trial, petitioner timely moved to dismiss the RICO and CCE counts of the indictment, claiming them to be barred by (1) the Double Jeopardy Clause of the Fifth Amendment to the United

States Constitution, and (2) by the nature of the plea agreement upon which LeQuire relied in pleading guilty in 1984. A hearing was held on said motion in October, 1988, at which testimony was received from John C. Bell, the United States Attorney for that district in 1983 and 1984, responsible for the original case, Charles L. Truncale, the Assistant United States Attorney assigned to LeQuire's earlier case, and F. Lee Bailey and Ira C. DeMent, LeQuire's defense counsel when the 1984 plea was entered.

At the October, 1988 hearing on the motions to dismiss, the testimony of both United States Attorney Bell and Assistant United States Attorney Truncale revealed that RICO and CCE charges were considered in 1984. Truncale admitted the government had adequate evidence to charge these

offenses at that time while Bell thought they needed a third offense. This conclusion is, of course, inconsistent with the fact that the last act of the enterprise charged was the August 3, 1983 importation. Both Bell and DeMent had, with the passage of four and one-half years, problems with their recollection on critical matters, i.e., whether defense counsel had sought assurances that if LeQuire pleaded to two counts, he would not later be prosecuted under RICO or CCE. Mr. DeMent was certain, however, that LeQuire, was led to believe that such assurances were made. During the 1984 in-court plea allocution, following an in-camera session, it was expressly stated that there were no other deals favoring LeQuire other than the dismissal of two

counts because of an intentional effort to avoid any danger to petitioner.[1]

Also received in evidence was LeQuire's sworn statement (petitioner was not allowed to be present at the hearing on the motion) in which he stated that it was his understanding that the primary benefit he was to receive as a consequence of his April 23, 1984 plea of guilty was that there would be no further prosecutions arising out of the August 3, 1983 importation. LeQuire further asserted that absent this benefit he would not have pleaded guilty and waived his rights to trial. The district court accepted as true the testimony of the two

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[1] As discussed in the opinion below, the mother of a potential witness had been assassinated the night before LeQuire's trial was scheduled to begin by certain Colombians. LeQuire was acquitted of all counts dealing with that murder. 943 F.2d at 1558-59.

defense attorneys that they assured LeQuire that there would be no further prosecution. The court, however, denied the motion, finding there had been a breakdown in communication between Mr. DeMent and the prosecution.

On appeal, the United States Court of Appeals for the Eleventh Circuit rejected the double jeopardy claim finding that "racketeering constitutes an offense different than and separate from an offense involving narcotics charges," due to the complexity of proof required in RICO cases. 943 F.2d at 1559. The Eleventh Circuit also found that the record did not support the claim that the 1984 plea barred further prosecution. Id. at 1557 & n.7, 1560.

The court below also rejected petitioner's claim that the subsequent

prosecution was barred by the government's failure to obtain the instant indictment (July 29, 1988) until five days before the fifth anniversary of the last importation with which the alleged enterprise was purportedly connected (August 3, 1983). The Eleventh Circuit found that LeQuire did not establish that he suffered substantial prejudice by the pre-indictment delay or that the government intentionally delayed to gain tactical advantage. Id. at 1560.

REASONS FOR GRANTING THE WRIT

THE DECISION BELOW FINDING NO BAR TO RICO AND CCE PROSECUTIONS IS IN CONFLICT WITH THE DECISIONS OF THIS COURT AND OTHER UNITED STATES COURTS OF APPEALS AND HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

A. The Double Jeopardy Clause Applies To Subsequent RICO And CCE Prosecutions Where There Is No Conduct Alleged Beyond That Which Is The Subject Of The Prior Prosecution.

The court below rejected petitioner's claim that the instant RICO and CCE prosecution is barred by the Double Jeopardy Clause because of his guilty plea in 1984 to cocaine importation and possession charges. The Eleventh Circuit held:

> In view of the complex aspects of proof required in a RICO prosecution, such as the requirement of both an enterprise and a pattern of activity, we conclude that racketeering constitutes an offense different than and

> separate from an offense involving narcotics charges.

943 F.2d at 1554 (footnote omitted). In reaching this broad conclusion, the court below both incorporated by reference its decision in United States v. Gonzalez, 921 F.2d 1530 (11th Cir. 1991), cert. denied, 112 S.Ct. 96(1991), and recognized that its decision in the case at bar conflicted with views expressed by the United States Court of Appeals for the Second Circuit in United States v. Calderone, 917 F.2d 717 (2d Cir. 1990), vacated, No.90-1527 (1992).[2] LeQuire, 943 F.2d at 1559 n.10. In Gonzalez, the Eleventh Circuit rejected

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[2] Although Calderone was very recently vacated by this Court, presumably in light of United States v. Felix, 112 S.Ct. 1377 (1992), the important issue of federal law in this case remains unresolved by this Court as discussed below and dicta in Calderone is useful in analyzing that issue.

the rationale of Calderone[3] opting for the reasoning and conclusions of Third Circuit panels in United States v. Pungitore, 910 F.2d 1084 (3rd Cir. 1990), cert. denied, 111 S.Ct. 2009 (1991), and United States v. Esposito, 912 F.2d 60 (3d Cir.1990), cert. dismissed, Esposito v. United States, 111 S.Ct. 806 (1991); Gonzalez, 921 F.2d at 1539.

The controversy, of course, centers on the appropriate application of the new double jeopardy test announced by this Court in Grady v. Corbin, 495 U.S. 508, 110 S.Ct. 2084 (1990). In Grady, the Court held that the Double Jeopardy Clause bars a subsequent prosecution "if, to establish an essential element of an

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[3]The Gonzalez court also attempted to distinguish another conflicting decision of the Second Circuit, i.e., United States v. Russo, 906 F.2d 77 (2nd Cir. 1990). Gonzalez, 921 F.2d 1530, 1539 n. 13.

offense charged in the prosecution, the government will prove conduct that constitutes an offense for which the defendant has already been prosecuted." 110 S.Ct. at 2093. Although Grady applied this "same conduct" test to a single transaction case, the Second Circuit in the recently vacated Calderone decided that it is equally applicable to conspiracy cases, 917 F.2d at 721-722, and that it is likely applicable to subsequent RICO prosecutions. The concurring opinion of Circuit Judge Newman properly recognizes that if "Grady applies to continuing conduct offenses, I doubt if the double jeopardy analysis becomes less rigorous simply because Congress has defined a more complicated crime." Id. at 723 (Newman, J., concurring), citing United States v. Russo, supra (pursuant to

Grady, prior prosecution for a RICO conspiracy barred subsequent prosecution for obstruction of justice).

This Court, of course, has very recently determined that the Double Jeopardy Clause does not, under the Grady test, bar a subsequent conspiracy charge. United States v. Felix, 112 S.Ct. 1377 (1992). Although this Court cites with approval Garrett v. United States, 471 U.S. 773, 778 (1985), for the proposition that conspiracy and CCE prosecutions are not barred by prior convictions for the completed object of the conspiracy or for predicate offenses, 112 S.Ct. at 1384-1385, it does not resolve the issue presented herein. In this case, unlike Garrett, neither the CCE or RICO offenses are alleged to continue beyond the conduct alleged in the prior prosecution. The

court below relies heavily on the Garrett decision. In so doing, it misses the critical distinction between Garrett and the facts presented in the case at bar as discussed above. Clearly, the Double Jeopardy Clause does not bar a subsequent CCE or RICO prosecution if the government shows conduct subsequent to the first prosecution, for as this Court said in Garrett:

> One who insists that the music stop and the piper be paid at a particular point must at least have stopped dancing himself before he may seek such an accounting.

471 U.S. at 790. In the case at bar, LeQuire "stopped dancing" on August 3, 1983, and he is entitled to a jeopardy "accounting." LeQuire, 943 F.2d at 1560 n.11. As Judge Newman notes in Calderone, neither Grady nor Garrett address situations "when offenses arise out of

continuing conduct but no conduct of the defendants is alleged to have occurred after the first prosecution." 917 F.2d at 723. See also United States v. Giovanello, 945 F.2d 479, 492 (2d Cir. 1991); United States v. Scarpa, 913 F.2d 1013 & n.8 (2d Cir. 1990).

Double Jeopardy protection must be afforded to those defendants such as LeQuire whose conduct is not ongoing and who have already been prosecuted for conduct which is being used to establish the essential element of a predicate act for a subsequent RICO or CCE prosecution.

B. A Defendant's Belief That An Earlier Plea Agreement For Drug Offenses Barred Future Prosecutions Involving The Same Transaction Prohibits Subsequent RICO And CCE Prosection Or Mandates Withdrawal Of The Earlier Plea.

Consistent with the fundamental double jeopardy argument in Argument A,

supra, was petitioner's belief that his 1984 plea of guilty to two counts of importation and possession of cocaine relating to the August 3, 1983 importation barred subsequent prosecutions involving those transactions. The court below, without case support, rejected the notion that petitioner's belief in fact acted as a bar to the subsequent RICO and CCE prosecution, stating merely that the 1984 agreement and Rule 11 proceedings do not support the presence of an agreement that there would be no future prosecutions. LeQuire, 943 F.2d at 1557 & n.7, 1560.

This rejection of petitioner's argument must fail on two grounds. First, the court below ignored the factual findings and evidence elicited at a hearing on LeQuire's motions to dismiss in October, 1988. Second, controlling case

law of this Court and many Circuits requires determination of what a defendant reasonably understood when he entered his plea and rejects "rigidly literal construction of the language of the plea agreement." United States v. Shorteeth, 887 F.2d 253, 256 (10th Cir. 1989); see also United States v. Quan, 789 F.2d 711, 713 (9th Cir. 1986), cert. dismissed, 478 U.S. 1033 (1986); In Re Arnett, 804 F.2d 1200, 1203 (11th Cir. 1986).

In Mabry v. Johnson, 467 U.S. 504, 509 (1984), this Court held that "only when it develops that the defendant was not fairly apprised of its consequences can his plea be challenged under the due process clause." In the case at bar, the district court found that the petitioner believed that his 1984 plea of guilty would forever foreclose any prosecutions

related to the August 3, 1983 importation. He reasonably believed this because his attorneys, who also testified, told him there was an agreement there would be no further prosecutions. Clearly, because of the realistic concerns of petitioner's safety in 1984, LeQuire would not have expected that this promise would be recited on the record. The former prosecutor's claim in 1988 that the promise of no further prosecution was not part of the 1984 agreement is significantly undermined by the testimony that the government was in a position at that time to initiate the additional RICO and CCE prosecutions, but for reasons not clear from the record chose not to do so at that time. Clearly, a defendant cannot make a voluntary and informed plea without accurate and complete information at the

plea bargaining stage. United States v. French, 719 F.2d 387 (11th Cir. 1983), cert. denied, 466 U.S. 960 (1984); Scott v. Wainright, 698 F.2d 427, 430 (11th Cir. 1983).

This Court stated in Santobello v. New York, 404 U.S. 257, 262 (1971):

> [w]hen a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled.

Courts of Appeals, including the Eleventh Circuit, in applying Santobello, consistently first look to what the defendant reasonably understood when he entered the guilty plea and, if there is a dispute, "the terms of the agreement will be determined by objective standards." United states v. Quan, supra, at 713; see also United States v. Nelson, 837 F.2d

1519, 1522 (11th Cir. 1988), rehearing denied, 845 F.2d 1032 (11th Cir. 1988), cert. denied, 488 U.S. 829 (1988).

It is this analysis the court below completely failed to undertake. Application of objective standards in the instant case compel a finding that the government breached the plea agreement that LeQuire reasonably understood he had. The remedies for that breach are spelled out by this Court in Santobello, i.e., either specific performance of the agreement or the defendant must be given the opportunity to withdraw his plea. 404 U.S. at 263. Obviously, LeQuire was afforded neither remedy. The courts appear to prefer the remedy of specific performance, see, e.g., United States v. Nelson, supra, at 1525, which in this case would require dismissal of the instant

indictment pursuant to the Due Process Clause of the Fifth Amendment.

C. Due Process Also Required Dismissal Of the Indictment For Prejudicial Pre-Indictment Delay.

Closely related to the issue of the breach of the plea agreement in the case at bar is the failure of the government to obtain the 1988 indictment until five days before the lapse of five years since the final predicate act alleged as part of the CCE and RICO enterprise. There is no doubt that petitioner had the burden of showing substantial prejudice and intentional delay for a tactical advantage in order to sustain a due process claim for pre-indictment delay. See LeQuire, 943 F.2d at 1560, and cases cited therein. See generally, Untied States v. MacDonald, 465 U.S. 1 (1982).

If, after a thorough review of the record below (and particularly the October 20, 1988 hearing in the district court on petitioner's motions to dismiss), the reviewing court determines that the record was inadequate to establish that there was a plea agreement for no further prosecution in 1984 because the attorney witnesses' recollections were vague, it is submitted that the "substantial prejudice" element of the due process violation is established. The court below rejected this argument because it failed to consider the evidence presented at the October, 1988 hearing as it was required to do for an appropriate due process analysis. See Argument C, supra; LeQuire, 943 F.2d at 1560. There can be no greater prejudice caused by delay than the loss of

evidence that, if available, would have compelled a dismissal of the indictment.

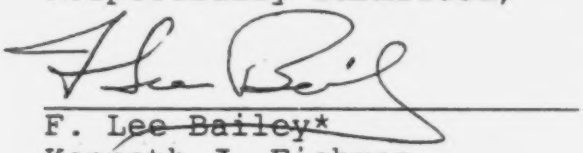
That the delay was intentional is also evident from the October 1988 hearing. While United States Attorney Bell claimed that the government had insufficient evidence to prove a RICO and CCE charge in 1984, that assertion is belied by the indictment itself which charges, as the last act of the enterprise, the 1983 importation. 943 F.2d at 1560 n.11. Moreover, Assistant United States Attorney Truncale's testimony conflicted with that of Bell's; Truncale admitted they could have charged these additional offenses in 1984 and, indeed talked about doing so. There is no legitimate explanation for the delay other than to gain a tactical advantage.

Under these circumstances, the Due Process Clause mandates a dismissal of the indictment. See, e.g., Stoner v. United States, 751 F.2d 1535 (11th Cir. 1985).

CONCLUSION

Based on the foregoing arguments and authorities, this Court is respectfully urged to grant the petition for writ of certiorari.

Respectfully submitted,



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APPENDIX A

UNITED STATES of America,
Plaintiff-Appellee,

v.

Charles Allen LeQUIRE, Mike Jenkins, Jerry Allen LeQuire, a/k/a Richard Martin, James Thomas LeQuire, Robert LeQuire, a/k/a Bob Martin, Bonnie Sue Anders, a/k/a Linda Hall, a/k/a Lynn Allen, a/k/a Ann Black, and Harold E. Ward, a/k/a Harold Hall, Defendants-Appellants.

No. 89-7155.

United States Court of Appeals,
Eleventh Circuit.

Appeals from the United States District Court for the Middle District of Alabama.

Before TJOFLAT, Chief Judge, FAY, Circuit Judge, and HOFFMAN*, Senior District Judge.

HOFFMAN, Senior District Judge:

Appellants Jerry LeQuire, James LeQuire, Charles LeQuire, Robert LeQuire,

Bonnie Sue Anders, Harold Ward and Michael Jenkins were convicted in the United States District Court for the Middle District of Alabama on RICO drug conspiracy charges. The convictions are based on a series of incidents involving the importation of large amounts of cocaine from Colombia, South America.

All appellants were found guilty of conspiracy to violate the Racketeer Influenced and Corrupt Organizations Act ("RICO").[1] In addition, Jerry LeQuire was convicted of conducting an enterprise's affairs through a pattern of racketeering activity[2] and engaging in a continuing criminal enterprise.[3]

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[1]18 U.S.C. § 1962(d).

[2]18 U.S.C. §1962(c).

[3]21 U.S.C. § 848.

A multitude of issues are raised on appeal, many of which have been adopted by some or all defendants. After examining each argument, we affirm each appellant's conviction on all counts, with the exception of the judgment concerning the conviction of Bonnie Sue Anders which we reverse and remand for a new trial.

*Honorable Walter E. Hoffman, Senior U.S. District Judge for the Eastern District of Virginia, sitting by designation.

FACTS

Jerry Allen LeQuire headed an extensive operation importing cocaine from Colombia. The drug smuggling began in late 1981 or early 1982 and continued until August of 1983. The evidence at trial revealed an extensive, well-orchestrated conspiracy in which LeQuire

arranged for personally owned[4] airplanes to fly from Fort Lauderdale, Florida, into South America for the purpose of transporting large amounts of cocaine back into the United States.

Upon arriving in Colombia, LeQuire's planes were loaded with duffel bags of cocaine and refueled for the return flight. The planes would fly at low altitudes until they reached an airport in Alabama, Tennessee or Georgia.

LeQuire arranged for his ground crews to arrive at the landing sites at

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[4]The airplanes were titled in the names of corporations created by Jerry LeQuire, but the true ownership rested in him. LeQuire himself, after being convicted on a marijuana charge and sentenced in the Key West, Florida federal court, and on bond pending appeal, used the name Richard Martin and avoided serving time on the Key West case until he was arrested in August 1983, for a cocaine smuggling and possession charge in the federal court in Alabama.

approximately the same time as the airplanes. After scouting the area to ensure safety, the ground crew would either arrange for a landing or direct the aircraft to an alternate site.

The planes usually landed after sunset and remained on the ground long enough for the duffel bags to be pushed onto the runway. The entire procedure took only a few minutes. Subsequently, the plane would fly back to the Fort Lauderdale base while the ground crew would drive the cocaine to the base in the trunks of their cars. Vast amounts of cocaine entered the United States in this

manner[5] and the enterprise produced extraordinary profits.[6]

On August 3, 1983, a large quantity of cocaine was seized by the federal authorities at Dannelly Field in Montgomery, Alabama. On April 23, 1984, Jerry LeQuire pled guilty to counts of possession of cocaine and importation of cocaine (R. 6-54). LeQuire contends that another condition of the plea was that no further prosecution of any sort would be brought as a result of the August 3, 1983

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[5]Karla Espinal, the former wife of Jerry Allen LeQuire, testifying under an agreement with the government, recalled a celebration which took place when the organization became the first group to make 70 successful trips into Colombia without being apprehended by the authorities (R. 14-1339).

[6]Testimony reflected that as much as 280 million dollars in cash was stored at Jerry LeQuire's house at one time, much of which remains unaccounted for.

importation. This contention, however, is not supported by the record.[7]

On July 29, 1988, Jerry LeQuire and the other appellants were named in the indictment underlying this case. The appellants were charged with numerous RICO and Continuing Criminal Enterprise ("CCE") offenses arising out of the drug smuggling enterprise, including the August 3, 1983 incident. In all, 25 persons were named as defendants in the 50-page indictment, containing ten counts. On the motion of some defendants, a severance was granted, following which a superseding indictment was returned in the severed case. This

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[7]Conversely, statements by the U.S. Attorney, and the plea agreement itself, indicate that the acceptance of LeQuire's plea to the two counts constitutes the *entire* agreement between the parties. Additionally, during the Rule 11 hearing on the guilty pleas, the prosecutor stated in open court that there were no other agreements not specifically stated.

case was tried to a jury with resulting verdicts of guilty, now approved on appeal in *United States v. Gonzalez*, 921 F.2d 1530 (11th Cir.1991). A large number of the original twenty-five defendants were severed, but several were fugitives and other than the appellants, the vast majority of the indicted persons entered pleas of guilty pursuant to plea agreements and testified for the prosecution.

The evidence adduced at trial demonstrated participation in the enterprise on the part of each appellant. Jerry Allen LeQuire was the kingpin in the organization. Charles LeQuire, Jerry' son, was responsible for the management and financial matters of the enterprise. Bonnie Sue Anders, the evidence showed, tapped telephones, transported cocaine and

money, and laundered money on behalf of the organization. Thomas LeQuire, Jerry's brother, was involved in several decisions regarding the enterprise and also transported the cocaine. Michael Jenkins stole dynamite and delivered money to various individuals in aid of the enterprise. Harold Ward was on the ground crew involving several shipments of cocaine and was linked to discussions regarding the purchase of a plane for future smuggling. The evidence shows that each appellant was involved in the enterprise in various capacities.

A jury found the appellants guilty of a conspiracy to violate RICO. In addition, Jerry LeQuire was convicted of conducting an enterprise's affairs and of engaging in a continuing criminal enterprise. Consequently, Jerry LeQuire

was sentenced to a total of sixty years imprisonment and fined $500,000. Charles LeQuire was sentenced to fourteen years and fined $100,000. Bonnie Sue Anders and Michael Jenkins were sentenced to twelve years. James LeQuire, Robert LeQuire and Harold Ward were each sentenced to imprisonment for ten years. Two of the original defendants, Gene LeQuire and Mike LeQuire,[8] were found not guilty, and Jerry Allen LeQuire, on substantive counts, was also found not guilty as to Counts VII, VIII, IX, and X.

Because we believe that it is a factor in determining "harmless error" in

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[8]The jury had apparently deadlocked on the guilt or innocence of Mike LeQuire and, without identifying the defendant, sent a note to the Court stating, in effect, that they had agreed except as to Counts I and X as to a defendant. The Government then agreed to dismiss these counts as to that defendant.

the case involving Jerry Allen LeQuire, some consideration should be given to Counts VII, VIII and IX pertaining indirectly to the murder of Mildred Ann Cornell on Sunday night, April 22, 1984, in Florida. The evidence discloses that one Terry Cornell had apparently introduced Jerry Allen LeQuire to the Colombians who were providing the cocaine which LeQuire later arranged to be flown to the United States. Subsequently, Terry Cornell, Jr., the son of Mildred Ann Cornell, became active in LeQuire's operations and, along with many others, was interviewed after August 3, 1983, and apparently finally indicated his guilt. The testimony of Karla Espinal, LeQuire's former wife, gave a vivid description of LeQuire's reaction when he learned that Terry Cornell, Jr., planned to testify for

the prosecution and against LeQuire at the trial commencing on April 23, 1984. Initially, according to Espinal, LeQuire wanted to "do away" with Terry Cornell, Jr., but for some reason these plans were changed and LeQuire had his then wife arrange with certain Colombians to kill Cornell's mother, Mildred Ann Cornell. In typical gang warfare, Mrs. Cornell was assassinated in Florida on the night before LeQuire's trial was to begin. LeQuire, of course, was in jail at all times after August 18, 1983. LeQuire presented some evidence at his 1988 trial that an agreement had been reached on April 18, 1984, that LeQuire would plead guilty on the following Monday, and that any motive to silence Terry Cornell, Jr. could not have existed.

Count VII charged Jerry Allen LeQuire, Alvaro Pelaez, James Thomas LeQuire, and Charles Allen LeQuire, with violating 19 U.S.C. § 1512(b)(2)(A), in using physical force against Mildred Ann Cornell with intent to cause and induce Terry Cornell, Jr. and others, to withhold testimony in the Middle District of Alabama official proceeding. Count VIII charges the same defendants with physical force to induce Terry Cornell, Jr. and others to be absent from the official proceeding in the Middle District of Alabama, even though summoned by legal process, in violation of 18 U.S.C. § 1512(b)(2)(D). Count IX charged that these same defendants "and others known and unknown to the Grand Jury" did fire and "cause to be fired" a machine gun into Terry Cornell, Jr.'s apartment in Fort

Lauderdale, Florida, causing injury and death to Mildred Ann Cornell, with intent to retaliate against Terry Cornell, Jr. for his attendance at the trial in the Middle District of Alabama, in violation of 18 U.S.C. § 1513(a)(1). Counts VII, VIII and IX were dismissed as to Charles Allen LeQuire and James Thomas LeQuire on motion of the government at the conclusion of all the evidence in the 1988 trial, thus leaving only Jerry Allen LeQuire as a defendant on trial as to these three counts.

Since Jerry Allen LeQuire was found not guilty as to Counts VII, VIII and IX, it may seem irrelevant to even refer to these counts, but the serious error on the part of the prosecutor in his closing argument to the jury in referring to LeQuire's failure to take the witness

stand or otherwise mention the Colombians makes it of importance in determining whether this was "harmless error" as applied to the facts of this case.

DISCUSSION

I. DOUBLE JEOPARDY

On appeal, Jerry LeQuire first argues that the district court erred, as a matter of law, in rejecting his claim that prosecution is barred by the Double Jeopardy Clause. LeQuire contends that his initial plea agreement, reached in 1984, barred later RICO and CCE prosecution. Essentially, he claims that the two prosecutions turn on similar facts and are thus barred by double jeopardy.

[1] This contention misunderstands the nature and purpose of RICO. The legislative history of RICO demonstrates that Congress did not intend predicate

offenses to be lesser included offenses in the RICO provisions. *United States v. Hawkins*, 658 F.2d 279 (5th Cir.1981); *United States v. Boldin*, 772 F.2d 719, 729 (11th Cir.1985), *cert. denied*, 475 U.S. 1048, 106 S.Ct. 1269, 89 L.Ed.2d 577 (1986). Instead, the two offenses "are intended to deter two different kinds of activity: racketeering on the one hand and narcotics violations on the other." *Boldin*, 772 F.2d at 729, *quoting United States v. Thomas*, 757 F.2d 1359 (2d Cir.1985), *cert. denied*, 475 U.S. 1098, 106 S.Ct. 1498, 89 L.Ed.2d 899 (1986).

[2] Further, in his brief Jerry LeQuire recognizes the applicability of *Garrett v. United States*, 471 U.S. 773, 105 S.Ct. 2407, 85 L.Ed.2d 764 (1985), in complex RICO cases (Brief of Appellant Jerry LeQuire at 28). In *Garrett*, the

Supreme Court held that successive prosecutions for a CCE and the offense of importation of narcotics, charged as a predicate offense under the CCE charge, did not violate double jeopardy principles. LeQuire's acknowledgement of the *Garrett* case in this context lessens our need to examine the impact of the Supreme Court's recent decision in *Grady v. Corbin*, -- U.S. --, 110 S.Ct. 2084, 2090 109 L.Ed.2d 548 (1990) (superseded by statute as stated in *Purcell v. United States*, 594 A.2d 527 (D.C.App.1991)).[9] We note, however, that the rationale of

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[9]In *Grady*, the defendant was at fault in a car accident in which the driver of another vehicle was fatally injured. After a guilty plea of driving while intoxicated and failing to keep to the right of the median had been entered, the prosecutor attempted to bring charges of manslaughter and assault arising out of the same accident. The defendant objected on double jeopardy grounds.

Garrett is more appropriate than *Grady* in RICO situations, which can run over an extended period of time and involve a large number of individuals. *Grady*, on the other hand, is more applicable in single offense situations, such as drunk driving. In view of the complex aspects of proof required in a RICO prosecution, such as the requirement of both an enterprise and a pattern of activity, we conclude that racketeering constitutes an offense different than and separate from an offense involving narcotics charges.[10]

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[10]Two post-*Grady* cases from the Third Circuit, *United States v. Esposito*, 912 F.2d 60 (3d Cir.1990), *reh'g denied*, *United States v. Esposito*, 1990 W1106249, 1990 U.S.App. LEXIS 23, 197 (3d Cir.1990), and cert. dismissed, Esposito v. United States, -- U.S. --, 111 S.Ct. 806, 112 L.Ed.2d 1032 (1991), and *United States v. Pungitore*, 910 F.2d 1084 (3d Cir.1990), reach similar conclusions in applying *Grady* to RICO offenses. However, on October 24, 1990, the Second Circuit decided *United States v. Calderone*, 917

As a further double jeopardy contention, Jerry LeQuire argues that he was subjected to multiple prosecutions because of the government's failure to exercise due diligence. Specifically, LeQuire alleges that the government had sufficient evidence to prosecute for RICO and CCE violations in 1984, but failed to do so until five days before the fifth anniversary of the Montgomery importation.[11] This contention, however,

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F.2d 717 (2d Cir.1990), which tends to express contrary views. See our discussion of this issue in *United States v. Gonzalez*, 921 F.2d 1530 (11th Cir.1991), incorporated herein by reference.

[11]The Montgomery, Alabama, drug shipment of August 3, 1983, was seized by the federal authorities. Although this was the last importation with which the LeQuire enterprise was allegedly connected, the indictment in this case was returned on July 29, 1988.

is not supported by the facts or law in this case.

[3] Initially, it must be noted that any pre-indictment delay should be analyzed under the Fifth Amendment's due process clause. *United States v. MacDonald*, 456 U.S. 1, 102 S.Ct. 1497, 71 L.Ed.2d 696 (1982). Binding precedent in this Court dictates that to show a due process violation, a defendant must satisfy a two-prong test. First, the defendant must show that the delay caused actual prejudice to his defense; and second, the defendant must prove that the delay was a product of deliberate design by the government to gain a tactical advantage. *See, e.g., Stoner v. Graddick*, 751 F.2d 1535, 1542 (11th Cir.1985); *United States v. Warren*, 772 F.2d 827, 836 (11th Cir.1985), *cert. denied*, 475 U.S.

1022, 106 S.Ct. 1214, 89 L.Ed.2d 326 (1986); *United States v. Jorge-Salon*, 734 F.2d 789, 791-92 (11th Cir.), *cert. denied*, 469 U.S. 869, 105 S.Ct. 215, 83 L.Ed.2d 145 (1984).

[4] The appellants have not shown substantial prejudice or intentional delay for tactical advantage in this case. A stringent standard is employed when examining the issue of prejudice. *Stoner*, 751 F.2d at 1544 (citing *Tiemens v. United States*, 724 F.2d 928, 929 (11th Cir.), *cert. denied*, 469 U.S. 837, 105 S.Ct. 134, 83 L.Ed.2d 74 (1984)). "The prejudice shown must be such as to impair the fairness of the trial." *United States v. Solomon*, 686 F.2d 863, 872 (11th Cir.1982).

In examining LeQuire's claim and the record itself, we can find no substantial

prejudice caused by this delay. There is no mention of deaths of key witnesses, destruction of documents or evidence, or any other event which would impair the fairness of the trial. Instead, LeQuire claims that specifics surrounding his 1984 plea agreement can no longer be remembered by his counsel, thus denying him the opportunity to exploit this at trial (Brief of Appellant at 29). An examination of the 1984 agreement and a transcript of the Rule 11 proceedings, however, reveals that the plea itself constitutes the entire agreement between the two parties; thus, this argument is without merit. The prejudice alleged by LeQuire simply does not measure up to the stringent standard employed in these cases. Accordingly, we affirm the

district court's denial of relief on this ground.

Additionally, we hold that LeQuire has not met his burden of proving intentional delay for tactical advantage. LeQuire made no showing that the prosecution delayed to gain a tactical advantage. The prosecution, on the other hand, alleges that it had insufficient evidence and witnesses to prove a RICO charge or a Continuing Criminal Enterprise in 1984. Further, Karla Espinal, the key witness for the prosecution, did not begin cooperating with the government until September of 1987. These factors demonstrate a need on the part of the prosecution to further investigate the drug smuggling operation.

[5] Prosecutors are under no duty to file charges before they feel they can

meet their burden of proof. *United States v. Reme*, 738 F.2d 1156, 1163 (11th Cir.1984), *cert. denied*, 471 U.S. 1104, 105 S.Ct. 2334, 85 L.Ed.2d 850 (1985). Moreover, "even where the defendant has been prejudiced by pre-accusation delay, if it is investigative delay the defendant has not been deprived of due process." *Id.*

LeQuire has not met his burden here. Since controlling precedent in this court places the burden on the defendant to prove an intent to delay to gain tactical advantage, we must affirm denial of relief on this ground.

II. VARIANCE BETWEEN INDICTMENT AND PROOF

Bonnie Sue Anders, James LeQuire, Charles LeQuire, Robert LeQuire and Michael Jenkins allege that there was a variance between the indictment and the

proof on the conspiracy charge. Essentially, they contend that the conspiracy to smuggle cocaine and marijuana into the United States ended on August 3, 1983.[12] Based on this contention, the appellants argue that any evidence of activities after this date establishes separate and distinct conspiracies constituting a variance

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[12]Several attempts to break Jerry LeQuire out of jail are indicative of the fact that the enterprise did not shut down on August 3, 1983, but instead continued to operate with the hope of further importation of cocaine for profit. The attempts to break out of jail were testified to by Karla Espinal, the former wife of Jerry LeQuire, and allegedly were to take place in Miami, Key West and Montgomery, Alabama. The latter attempt was fully supported by a not written by Jerry LeQuire to his then wife, Karla, which was in evidence and which also refers to a plan better than taking over two U.S. Marshals. Even as late as April 1985, Jerry LeQuire and some of his associates had vague plans to be released from the federal penal system by committing acts of terrorism-dynamite bombings to be specific.

between the indictment and the proof at the trial.

[6] No material variance will exist if a reasonable trier of fact could have found beyond a reasonable doubt the existence of the single conspiracy charged in the indictment. *United States v. Cole*, 755 F.2d 748, 764 (11th Cir.1985). Furthermore, in *United States v. Watchmaker*, 761 F.2d 1459, 1477 (11th Cir.1985), *cert. denied*, 474 U.S. 1100, 106 S.Ct. 879, 88 L.Ed.2d 917 (1986), the court stated:

Finally, appellants argue that their convictions should be reversed because the evidence proved multiple conspiracies rather than the single conspiracy required by RICO. Because of the variety of activities which may be undertaken by a criminal enterprise, there are few RICO

trials in which such a claim could not be made, and it has been soundly rejected by the courts of this Circuit.

The reasoning applied in *Watchmaker* is relevant to the instant case as well. We conclude, therefore, that there was no material variance in this case. A reasonable jury could have found that the evidence presented at trial established that the appellants conspired to engage in one common enterprise even after the August 3, 1983 seizure of cocaine in Alabama.

[7] Even if the evidence did not support the finding of a single conspiracy, such is not fatal to the convictions unless it prejudices substantial rights of the appellants. Prejudice to substantial rights can exist in one of two circumstances: (1) where

proof at trial is so different from the indictment that a defendant was unfairly surprised and could not prepare a defense and (2) where so many defendants exist that a jury is likely to confuse evidence among the defendants. *United States v. Caporale*, 806 F.2d 1487, 1500 (11th Cir.1986), *cert. denied*, 483 U.S. 1021, 107 S.Ct. 3265, 97 L.Ed.2d 763 (1987).[13]

After examining the record, we can find no prejudice in this case. A reasonable jury could have found, based on

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[13]Appellant Bonnie Sue Anders claims that since evidence showed her involvement in only the alleged second conspiracy, this constitutes a misjoinder under Rule 8(b) of the Federal Rules of Criminal Procedure. In addition, Anders claims that such a misjoinder is inherently prejudicial. The Supreme Court, however, has held that misjoinder under Rule 8 is subject to a harmless error test, thus implying that one claiming misjoinder must prove prejudice as well. *United States v. Lane*, 474 U.S. 438, 106 S.Ct. 725, 88 L.Ed.2d 814 (1986). Anders has not satisfied this test.

the evidence presented at trial, a single conspiracy in which the appellants were active participants. More importantly, the fact that Jerry LeQuire was acquitted on certain charges and two other defendants were acquitted outright demonstrates that the jury was able to sift the evidence as to each defendant individually. *See, e.g., United States v. Rodriguez*, 765 F.2d 1546, 1553 (11th Cir.1985). Thus, the appellants were fairly notified of any charges against them and the indictment was not so confusing that the jury could not determine guilt.

III. SUFFICIENCY OF THE EVIDENCE

Appellants Ward, Jenkins, James LeQuire, Charles LeQuire and Robert LeQuire argue that the evidence is insufficient to prove their connection

with the enterprise or the requisite number of predicate acts. In addressing this contention, we review the evidence in the light most favorable to the government and may reverse only if no reasonable jury could have found appellants guilty beyond a reasonable doubt. *Glasser v. United States*, 315 U.S. 60, 80, 62 S.Ct. 457, 469 86 L.Ed. 680 (1942); *United States v. Watson*, 866 F.2d 381 386 (11th Cir.1989).

[8] Guilt under the conspiracy provision of RICO, 18 U.S.C. § 1962(d), requires a showing of a defendant's participation, either directly or indirectly, in a scheme to violate one of the listed "prohibited activities". *United States v. Kopituk*, 690 F.2d 1289, 1323(11th Cir.1982), *cert. denied*, 463 U.S. 1209, 103 S.Ct. 3542, 77 L.Ed.2d 1391 (1983) (citing *United States v. Elliott*,

571 F.2d 880, 903 (5th Cir.), *cert. denied*, 439 U.S. 953, 99 S.Ct. 349, 58 L.Ed.2d 344 (1978)). The participation in the prohibited activity, however, must be in the form of the commission of two or more predicate acts. *Id.* The existence of the conspiracy agreement does not have to be proven by direct evidence. Instead, it can be inferred from "the conduct of the alleged participants or from circumstantial evidence of the scheme." *United States v. Ard*, 731 F.2d 718, 724 (11th Cir.1984) (quoting *United States v. Ayala*, 643 F.2d 244, 248 (5th Cir. Unit A 1981)).

After a careful review of the record in the light most favorable to the government, we conclude that the evidence was sufficient to allow a reasonable trier of fact to find guilt beyond a reasonable

doubt. In contending that the evidence is insufficient to support prosecution, the appellants argue that any evidence of their participation in the drug smuggling operation has been refuted by their testimony or by testimony of other witnesses. Furthermore, the appellants argue that the one witness who testified as to activities involving each of them in the enterprise, Karla Espinal, is biased due to her hatred of the LeQuire family.

The appellants obviously are "unfamiliar with the line of cases in this Circuit holding that uncorroborated testimony of an accomplice is sufficient to support a conviction in the Federal Courts if it is not on its face incredible or otherwise insubstantial." *United States v. Iacovetti*, 466 F.2d 1147, 1153 (5th Cir.1972), *cert. denied*, 410 U.S.

908, 93 S.Ct. 963, 35 L.Ed.2d 270 (1973), *cited in United States v. Elliott*, 571 F.2d 880, 895 fn. 13 (5th Cir.1978). For a witness's testimony to be incredible or insubstantial on its face, it must be "testimony as to facts that [the witness] physically could not have possibly observed or events that could not have occurred under the laws of nature." *United States v. Garner*, 581 F.2d 481, 485 (5th Cir.1978) (quoting *United States v. Cravero*, 530 F.2d 666, 670 (5th Cir.1976)). Applying this standard, we find that the testimony in this case not incredible and sufficient evidence exists in the record to support the convictions.[14]

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[14]Appellant Ward also alleges that the indictment itself was insufficient in that the government failed to establish the required predicates before the grand jury. The decision of the Supreme Court in

IV. SEVERANCE

Following the return of the indictment on July 29, 1988, motions for severance were filed by numerous defendants. By order entered on November 7, 1988, the trial court granted severance as to certain persons not then served with the indictment, i.e., Arrango, Gonzalez, Herrera, Palaez and Wilson. Severance was also granted pursuant to motions for severance or for reasons noted by the court as to Abner, William Benton Ziegler, Harry Dale Ziegler, Allen Camplin, Mahdi,

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Costello v. United States, 350 U.S. 359, 76 S.Ct. 406, 100 L.Ed. 397 (1956), however is dispositive of this argument. In *Costello*, the Court held that inadequate evidence before a grand jury could not be the basis for challenging an indictment. *Id. see also United States v. Norton*, 867 F.2d 1354, 1358 (11th Cir.), *cert. denied*, 491 U.S. 907, 109 S.Ct. 3192, 105 L.Ed.2d 701 (1989). Thus, Ward's claim must fail.

Menendez, Maierhoffer, Preswood, Roundy, Sweeton and Wilson. This left the following defendants for trial on November 29, 1988 in this case: Jerry Allen LeQuire, James thomas LeQuire, Charles Allen LeQuire, Robert LeQuire, Michael LeQuire, Gene LeQuire, Mike Jenkins, Bonnie Sue Anders and Harold E. Ward.

Harold Ward and James LeQuire argue that the court erred in denying their motions for severance. The major argument of appellant Ward involves the alleged spillover effect from his joinder with the other defendants, who allegedly had much greater involvement in the enterprise. Appellant James LeQuire, on the other hand, states that the district court erred in denying his motion for severance made after the court decided that a vault found in his back yard could not be used as

evidence against him, but could be introduced against his codefendants.[15] After reviewing both claims, we find that the appellants have not shown compelling prejudice as a result of the joint trial and we affirm the district court's denial of the motion to sever.

[9, 10] Initially, we note that the denial of a motion for severance is reversible only for an abuse of discretion, and compelling prejudice must be proved before an abuse of discretion will exist. *United States v. Watchmaker,*

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[15]The trial judge decided that the vault, allegedly used to store money for the enterprise, should be suppressed as evidence against James LeQuire due to the illegal search in which it was found. The other appellants did not have standing to object to the search and thus, the vault could be introduced against them. (R. 3-547). The introduction of this evidence against the other defendants, James LeQuire argues, allowed this information to spill over into his trial.

761 F.2d 1459, 1476 (11th Cir.1985), *cert. denied*, 474 U.S. 1100, 106 S.Ct. 879, 88 L.Ed.2d 917 (1986) (citing *United States v. Phillips*, 664 F.2d 971, 1016 (5th Cir.1981), *cert. denied*, 457 U.S. 1136, 102 S.Ct. 2965, 73 L.Ed.2d 1354 (1982)). Compelling prejudice cannot be solely proved by the quantity of evidence presented against codefendants. *See United States v. Casamayor*, 837 F.2d 1509, 1511 (11th Cir.1988), *cert. denied*, 488 U.S. 1017, 109 S.Ct. 813, 102 L.Ed.2d 803 (1989). Instead, we must determine whether the jury could sift through all of the evidence and render an impartial verdict as to each defendant. *Watchmaker*, 761 F.2d at 1476. If so, the motion for severance should be denied. *United States v. Zielie*, 734 F.2d 1447, 1464 (11th

Cir.1984), *cert. denied*, 469 U.S. 1198, 105 S.Ct. 957, 83 L.Ed.2d 964 (1985).

[11] In this case, the district court clearly instructed the jury at the beginning of the trial that each defendant and each offense was to be considered separately. This instruction was repeated at the end of the trial when the judge gave final instructions prior to deliberation. More importantly, the jury's acquittal of two defendants[16] demonstrates that the jury was able to sort through all of the evidence in this complex case. The appellants, therefore, were not prejudiced by the joint trial.

V. STATUTE OF LIMITATIONS

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[16]In addition to acquitting Michael and Gene LeQuire of all charges, the jury also acquitted Jerry LeQuire of the counts charged in the indictment relating to the murder of Mildred Ann Cornell on April 23, 1984.

[12] Appellant Ward argues that the trial court erred in not dismissing the charge against him on the ground that the five-year statute of limitations period had expired. Essentially, Ward contends that his activities ceased on May 23, 1983, when he was shot in the back during a robbery of a shipment of cocaine in Sylvania, Georgia. Since the indictment in this case was issued on July 29, 1988, Ward posits, his five-year limitations period had expired and his conviction is due to be reversed. This contention fails, however, because the indictment alleged, and the evidence showed, that the underlying conspiracy of which Ward was convicted continued until at least August 3, 1983.[17]

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[17]This is the last known date on which the organization transported cocaine into the United States from Colombia. The

[13] Law in this Circuit recognizes that a conspirator's participation in a conspiracy is presumed to continue until all activity relating to the conspiracy is ceased. *See United States v. Finestone*, 816 F.2d 583, 589 (11th Cir.), *cert. denied*, 484 U.S. 948, 108 S.Ct. 338, 98 L.Ed.2d 365 (1987). Accordingly, Ward is presumed to be a participant for the duration of the conspiracy unless he can overcome the presumption by proving his withdrawal.

[14] A two-prong test exists to establish a withdrawal from a conspiracy: 1) first, the defendant must prove that he has taken affirmative steps to defeat the objectives of the conspiracy and 2) he

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arrest of Jerry LeQuire on August 18, 1983 foiled the enterprise, although the government contends that attempted escapes from prison demonstrate an ongoing enterprise through at least April of 1984.

must show either that he made a reasonable effort to communicate these acts to his co-conspirators or disclosed the scheme to law enforcement authorities. *Id., citing United States v. United States Gypsum Co.*, 438 U.S. 422, 464-65, 98 S.Ct. 2864, 2887, 57 L.Ed.2d 854 (1978). Ward cannot succeed on either prong of this test. A careful review of the record does not disclose any affirmative act to disavow his part in this conspiracy. Even if we assume that he did disavow his activities, he did not communicate this disavowal to anyone. Conversely, Ward continued to cover up for the enterprise even after his involvement in the smuggling operation itself had allegedly ceased.[18] Thus, we

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[18]In the hospital after his shooting, Ward was questioned by the authorities concerning the robbery. His fictitious responses have since been refuted by the evidence.

must affirm the district court's decision that the case against Ward was not barred by the statute of limitations.

VI. EX POST FACTO LAWS

Appellant Ward also argues that his conviction is void as violative of the constitutional prohibition of ex post facto laws. Art. I, § 9, cl. 3. Specifically, he contends that because 18 U.S.C. §§ 1961 and 1962 did not exist at the time of his arrest in May of 1983, he cannot later be convicted under the same statute. We do not agree.

[15] The RICO statute was enacted into law in 1970. Moreover, sections 1961 and 1962 did in fact exist in 1983. Ward claims that a 1986 amendment to section 1961 violated his rights under the ex post facto clause, but fails to point out exactly which new clause violated his

rights. Section 1961 was amended to include sections 1512 and 1513 thereunder, dealing with the obstruction of justice. in the list of predicate acts under RICO. This modification, however, did not affect the rights of Ward, who had been involved in numerous enterprise activities prior to his shooting in 1983.

[16] Furthermore, this claim was never presented to the trial court and may not be raised for the first time on appeal. Failing to assert a defense at trial waives any future use of such defense. *United States v. Bascaro*, 742 F.2d 1335, 1365 (11th Cir.1984), *cert. denied*, 472 U.S. 1017, 105 S.Ct. 3476, 87 L.Ed.2d 613 (1985); *see also United States v. Wilson*, 894 F.2d 1245, 1253 (11th Cir.), *cert. denied*, ____ U.S. ____, 110 S.Ct. 3284, 111 L.Ed.2d 792 (1990).

VII. PROSECUTORIAL MISCONDUCT

Virtually all appellants ask us to reverse their convictions because of alleged improper comments made in the course of trial and during closing argument. These comments, they argue, prejudiced the jury and therefore denied them their right to a fair trial. As numerous comments are complained of, we shall address the contentions *in seriatim*.

A. *Jerry Allen LeQuire*

During his closing argument, the prosecutor made the following remark to the jury:

> Well, ladies and gentlemen, we have piled on more evidence in this case than just about those incidents, we have proven literally 70 to a hundred an[d] eight loads came in at the direction of Jerry Allen LeQuire, assisted by the people who sit with him, and others who are charged in this indictment.

> One thing Jerry Allen LeQuire does not have going for him, *he doesn't have the guts to tell it about the Colombians and get on that stand*–

(R. 19-2372) (emphasis added). Counsel for Jerry LeQuire, later joined by counsel for the other non-testifying defendants, demanded a mistrial, claiming that this was an impermissible reference upon the defendants' failure to testify. The government replied that the statement was not intentional, but instead was made in response to defense counsel's earlier argument that the government's case was made up of "liars on parade".

The district court denied the motion for mistrial, finding that although the remark was improper, it constituted harmless error in the context in which it was made. Because of the seriousness of the prosecutor's needless comment, we must

carefully examine the remark's impact on the fairness of LeQuire's trial.

[17] It is a basic constitutional precept that reversible error will exist in a criminal case if the prosection comments on the fact that the defendant does not testify. *Griffin v. California*, 380 U.S. 609, 612, 85 S.Ct. 1229, 1232, 14 L.Ed.2d 106, 108 (1965). A prosecutor's comment on the failure of the accused to testify may not, however, always mandate reversal. *Chapman v. California*, 386 U.S. 18, 22, 87 S.Ct. 824, 827, 17 L.Ed.2d 705 (1967); *Marsden v. Moore*, 847 F.2d 1536, 1548 (11th Cir.), *cert. denied*, 488 U.S. 983, 109 S.Ct. 534, 102 L.Ed.2d 566 (1988).

[18] In determining if a prosecutorial remark impairs the integrity of the defendant's right not to testify

the test is whether the defense can show that the remark was intended to comment on the defendant's silence *or* was of such character that a jury would naturally and necessarily construe it as a comment on the defendant's silence. *United States v. Stuart-Caballero*, 686 F.2d 890, 892 (11th Cir.1982), *cert. denied*, 459 U.S. 1209, 103 S.Ct. 1202, 75 L.Ed.2d 444 (1983). *See also United States v. Carrodeguas*, 747 F.2d 1390, 1395 (11th Cir.1984), *cert. denied*, 474 U.S. 816, 106 S.Ct. 60, 88 L.Ed.2d 49 (1985) ("test ... is whether or not the statement was manifestly intended or of such character that a jury would naturally and necessarily take it to be a comment on the failure of the accused to testify"). Moreover, the remark must be examined in the context in which it is made. *Rogers v. McMullen*, 673 F.2d 1185

(11th Cir.1982), *cert. denied*, 459 U.S. 1110, 103 S.Ct. 740, 74 L.Ed.2d 961 (1983).

[19, 20] Applying this test to the remark complained of in the instant case leads us to conclude that it was probably not manifestly intended. No manifest intent exists where another, equally plausible explanation for the remark is present. *Carrodequas*, 747 F.2d at 1395. In this case, the prosecutor contends that he did not manifestly intend to comment on Jerry LeQuire's failure to testify. Instead, he argues that his remark was intended only to rebut the accusation of the defense that the government's witnesses were liars. In response to an attack on the government and the conduct of its case, a prosecutor may present what even amounts to a bolstering argument if

it is specifically done in rebuttal to assertions made by defense counsel in order to remove any stigma cast upon the government or its witnesses. *United States v. Dorr*, 636 F.2d 117, 120 (5th Cir. Unit A 1981).

After a thorough examination of the circumstances surrounding the prosecutor's remark, we find his "invited argument" explanation for the remark to be at least as plausible as any argument that he manifestly intended to comment on Jerry LeQuire's failure to take the stand. Accordingly, we conclude, as did the trial judge, that the prosecutor had no manifest intent to comment on Jerry LeQuire's failure to testify.

The second part of the test, however, is more problematic. The prosecutor's remark that Jerry LeQuire "doesn't have

the guts to tell about the Colombians and get on that stand" could not have been interpreted by the jury as anything but a comment on Jerry LeQuire's silence.[19] The argument must now focus on whether the prosecutor's direct comment mandates reversal.

Jerry LeQuire contends that *United States v. Griggs*, 735 F.2d 1318 (11th Cir.1984), mandates reversal. In *Griggs*, the prosecutor made the following fatal error by saying:

> There is absolutely no evidence, there is no testimony, not a single person has said Mr. Griggs was afraid of an unjustified convictions. Mr. Thomas [Griggs' attorney] has just asked you to assume that, even though the defendant has

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[19]It is also important to note that the prosecutor made a gesture towards the witness stand while making the remark. This is further proof that the jury understood the comment to be an assertion that the defendant had failed to testify.

> not testified about it and no one has testified about it.

Griggs, 735 F.2d at 1320.

The court held that the defendant in *Griggs* was entitled to a new trial for the improper remark of the prosecutor; the *Griggs* opinion, however, makes no reference to the "harmless error" doctrine, as stated in *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967), holding that before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt.

Nor did *Griggs* consider *United States v. Hasting*, 461 U.S. 499, 103 S.Ct. 1974, 76 L.Ed.2d 96 (1983), decided about thirteen months prior to *Griggs*. *Hasting* referred to a prosecutor's statement in failing to rebut the prosecution's case.

On the government's appeal following the action of the Seventh Circuit in setting aside a jury verdict of guilty, the Supreme Court expressed the view that the Seventh Circuit was exercising its supervisory powers to discipline the prosecutor, and that the harmless-error rule of *Chapman* cannot be voided by an assertion of supervisory power over a prosecutor. In positing the issue it was said (p. 510, 103 S.Ct. p. 1981):

> The question a reviewing court must ask is this: absent the prosecutor's allusion to the failure of the defendant to proffer evidence to rebut the testimony of the victims, is it clear beyond a reasonable doubt that the jury would have returned a verdict of guilty?

Because the evidence demonstrated a compelling case of guilt, the Supreme Court reversed the Court of Appeals in

ordering a new trial based on the prosecutor's argument.

As we were concerned that *Griggs* failed to mention *Chapman*, *Hasting*, and the harmless-error rule, we have examined the briefs filed in *Griggs*.[20] anticipated the prosecution's argument on harmless-error is confined to one paragraph, ten lines in length. The force of the prosecution's argument was directed to other aspects of the case. Understandably, the defendant did not mention the harmless-error doctrine; but did discuss *United States v. Hasting*, 660 F.2d 301 (7th Cir.1980), which was later reversed by the Supreme Court. The prosecution, after the opinion had been

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[20]The briefs filed in *Griggs*, with the exception of the petition for rehearing, all predated the Supreme Court opinion in *Hasting*.

filed in *Griggs*, then petitioned for rehearing concentrating essentially all of its argument on the harmless-error rule, but the petition for rehearing was denied. The timing of the briefs with no emphasis on harmless-error may well have contributed to the *per curiam* opinion in *Griggs*. In light of the failure of the court in *Griggs* to consider this relevant and binding Supreme Court precedent, we decline to follow *Griggs* to the extent that it doe snot consider the harmless error rule. Accordingly, we now examine the application of the harmless error rule. Accordingly, we now examine the application of the harmless error rule in the present case. *Accord Marsden v. Moore*, 847 F.2d 1536, 1548 (11th Cir.1988).

The government contends, in essence, that the overwhelming evidence against Jerry LeQuire, combined with the curative instruction[21] given by the judge renders this improper comment harmless.

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[21]Immediately after the improper comment was made, the district court judge gave the following curative charge to the jury:

> At the time we recessed, Mr. Segrest had made a comment about Mr. LeQuire not having said something about the Colombians from the witness stand. He indicates that he was talking about—would have gone on to say that he didn't make any statements about the Colombians or has not cooperated in other respects. I charge you as strongly as I can charge you about anything in this case, that a person has an absolute right not to testify. And no adverse inference can properly be drawn if someone elects not to testify, and it would be improper and it is improper for the Government Attorney to suggest anything concerning the failure of any witness to take the witness stand.

(R. 19-2375-76). The use of the word "witness" in the last sentence was later corrected by the court by telling the jury that the word "defendant" was intended.

[21, 22] In declaring a constitutional error to be harmless, however, this court must be able to declare a belief that it was harmless *beyond a reasonable doubt*. *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). Given the inflammatory nature of the prosecutor's comment and his gesture made towards the witness stand, we would not conclude beyond a reasonable doubt that this was harmless error *but for* the fact that the jury returned not guilty verdicts in Jerry LeQuire's favor on issues pertaining directly to the Colombians (i.e., Counts VII, VIII, IX and X).

In addition, where Counts I, II, and III are concerned, trial counsel for Jerry LeQuire stipulated and conceded his client's guilt in flying marijuana into

Marathon, Florida, on December 5, 1981; in also flying a load of marijuana into Madisonville, Tennessee, and in finally causing the transportation of a loan of cocaine into Montgomery, Alabama. The overwhelming evidence of guilt on the RICO and CCE charges, as to Jerry LeQuire, and the curative instruction do negate the fact that an improper seed was planted in the minds of the jurors, thus possibly influencing their verdict. We, therefore, affirm Jerry LeQuire's conviction on these counts.

B. *Charles LeQuire, Robert LeQuire, Michael Jenkins and Harold Ward*

Appellants Charles LeQuire, Robert LeQuire, Michael Jenkins and Harold Ward, all of whom did not testify at trial, allege that the spillover affect from the improper comment concerning Jerry

LeQuire's failure to testify entitles them to a new trial as well. We disagree.

[23] In analyzing these contentions, we recognize that both direct and indirect comments on a defendant's failure to testify can invalidate a conviction. *United States v. Bright*, 630 F.2d 804, 825 (5th Cir. 1980). The test we must apply is unchanged by the fact that a direct statement does not exist as to any defendant except Jerry LeQuire. The appellants still must prove that it was the prosecutor's manifest intention to remark on their silence or that the jury necessarily understood the comment to be a statement on their silence. *United States v. Stuart-Caballero*, 686 F.2d 890, 892 (11th Cir.1982), *cert. denied*, 459 U.S. 1209, 103 S.Ct. 1202, 75 L.Ed.2d 444 (1983); *United States v. Rosenthal*, 793

F.2d 1214, 1243 (11th Cir.1986), *cert. denied*, 480 U.S. 919, 107 S.Ct. 1377, 94 L.Ed.2d 692 (1987). Moreover, the comments must be examined in the context in which they are made. *Rogers v. McMullen*, 673 F.2d 1185 (11th Cir.1982), *cert. denied*, 459 U.S. 1110, 103 S.Ct. 740, 74 L.Ed.2d 961 (1983).

[24]Here, the statement which the appellants claim denied them a fair trial was: "[o]ne thing *Jerry Allen LeQuire* does not have going for him, he doesn't have the guts to tell it about the Colombians and get on that stand" (R. 19-2372). This comment was made regarding Jerry LeQuire's failure to testify, not the appellants. Accordingly, we hold that the prosecutor did not possess the requisite manifest intent as to the non-testifying defendants.

Next, we must examine whether the jury naturally and necessarily would take the comment to be a statement on the appellant's failure to testify. The question is not whether the "jury possibly or even probably would view the challenged remark in this manner but whether the jury *necessarily* would have done so". *United States v. Griggs*, 735 F.2d 1318, 1324 (11th Cir.1984) (quoting *Williams v. Wainwright*, 673 F.2d 1182, 1185 (11th Cir.1982) (emphasis in original)).

In the instant case no direct mention was made of the non-testifying defendants' failure to testify. Instead, the remark was made concerning a co-defendant's silence and the jury could easily have taken it to be just that, a remark on Jerry Lequire's silence. In light of this finding, we cannot say that the jury

necessarily would have taken the challenged remark to be a comment on the appellant's failure to testify.

C. *Bonnie Sue Anders*

This defendant, Anders, was charged in three of the ten counts contained in the indictment.[22] The only point of any significance again involves the prosecutorial tactics in attempting to

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[22]Count One (I) was a RICO conspiracy count against all defendants to conduct the affairs of an enterprise through the commission of acts in a pattern of racketeering activity, alleging violation of 18 U.S.C. § 1962(c). This included a conspiracy to smuggle cocaine and marijuana into the United States from South America. Count Two (II) charged a RICO violation in conducting the affairs of an enterprise through a pattern of racketeering activity, in violation of 18 U.S.C. § 1961(1). Count Five (V) charged Anders with engaging in a continuing criminal enterprise (CCE). The trial court granted Anders' motion to dismiss Count Two for failure on the part of the prosecution to allege two or more predicate acts or crimes. Count Five was later terminated when the trial judge granted Anders' motion for judgment of acquittal under Fed.R.Crim.P. 29. Thus, only Count One remained for jury consideration as to Anders. Anders was found guilty under Count One pursuant to a jury verdict.

show the prior indictments and convictions of Bonnie Sue Anders in the instant case in which she elected not to testify and her character had not become an issue by any evidence offered by her. Fed.R.Evid. 404(a)(1).

The five (5) incidents involved each arose during the presentation of the government's case-in-chief. The first incident occurred on December 5, 1988, after the case had been proceeding for approximately one week. The witness was Brenda Champlin (testimony commenced at R. 13-1057), who was named as a defendant in the 1988 indictment (erroneously named Camplin) along with many others, and who negotiated a plea agreement requiring her to testify. Champlin had accompanied Anders to Fort Lauderdale from Kentucky on several occasions immediately following

the Sylvania, George, robbery on May 23, 1983. It is obvious that Anders and Champlin became good friends and that Anders' past history was well known to Champlin. At a point where the prosecutor was attempting to show the part played by Anders in the preparation of a partially fictitious video tape made in 1988 for purported use by the defendants in the 1988 trial, the prosecutor asked Champlin (R. 13-1095-96):

> Q. Okay. What was occurring that would require you--had you been indicted at that time?
>
> A. No.
>
> Q. Okay. What was occurring or what were you told was occurring that might put you in a position to have to testify in court?
>
> A. Someone else had been indicted.
>
> Q. Who?
>
> A. Bonnie Anders.

Q. But in a different case up in Kentucky, right?

A. Yes.

(MOTION FOR MISTRIAL)

At this point Brenda Champlin was temporarily excused (R. 13-1101) to return the following morning after the partially fictitious tape had been seen and heard by defense counsel. Layton Champlin, the son of Brenda Champlin, then testified. Although Layton was not indicted, his name was included in his mother's plea agreement. Layton testified for the balance of the day and was carried over until the next morning.

After the jury had been excused for the day, the motion for mistrial was argued. The Court volunteered to give a curative instruction and criticized the prosecution for not anticipating Brenda Champlin's response. Prosecutor Segrest

suggested that the answer of the witness only reflected that Anders was indicted in Kentucky but the nature of the alleged crime was not mentioned (R. 13-1144). Such an argument by the prosecutor is aside from the point that an indictment for any charge may well be perceived as reflecting on a trait of character; such character evidence is clearly prohibited by Federal Rules of Evidence 404(a).

Incident No. 2 occurred while Layton Champlin was testifying during the same afternoon session (R. 13-1134). Another prosecutor was questioning the witness:

> Q. Okay. Let's talk about that tape. When did you make this tape?
>
> A. That was after Bonnie was indicted in Kentucky.
>
> Q. And what year was that?
>
> A. That was—this is—this year.
>
> Q. 1988?

A. Yes, ma'am.

(MOTION FOR MISTRIAL)

It is difficult to conclude that the direct question by the prosecutor commanded the answer which was forthcoming from Layton Champlin. Other than to note that the prosecutors or investigative agents should have warned Layton Champlin to avoid any reference to Anders' indictment and conviction, the error could probably be overcome by a curative instruction. It is apparent, however, that the prosecution team made no effort to warn prospective witnesses to avoid references to obviously inadmissible testimony. The prosecutors, for themselves, claim a lack of time, but the many agents for the various law enforcement agencies are fully capable of rendering this service to the prosecutors

and thus assist in avoiding the errors occasioned by overly zealous prosecutors.

Incident No. 3 again involved Brenda Champlin when she continued the following morning on direct examination (R. 14-1182). Renewing the unnecessary and repetitious questioning of this witness as to the preparation of the partially fictitious tapes, prosecutor Segrest asked (R. 14-1189):

> Q. Now, at that time on July the 24th, 1988, you have not been indicted, had you?
>
> A. No, I hadn't.
>
> Q. Did you know that you were even being investigated?
>
> A. No, I didn't.
>
> Q. Was anything said on that occasion in July of '88 or on July the 24th of '88, about you were under investigation?
>
> A. No.
>
> Q. What was said as to the reason for making this tape?

A. Because there had been an indictment before, which I was not involved.

Q. Okay. Who said that—no, no. All I am asking you is whether anything was said to you about your being investigated?

A. No.

(MOTION FOR MISTRIAL RENEWED AND OVERRULED)

When the motion for mistrial was renewed in the absence of the jury by counsel for Anders (R. 14-1204), the court directed an inquiry to the prosecutor, "I will hear from you as to what in the world you were doing." The prosecutor replied (R. 14-1204):

> I am not charging her with a separate offense. I am charging that the person that perpetrated it with a lawyer present [Russell, the Tennessee attorney who did not represent either Champlin or Anders], a lawyer that didn't tell her that it might be a violation of law to do that. Now, I was not attempting to elicit anything about the Kentucky charges at all. There was a conversation that I understood about

the fact that Karla was talking and an investigation was going on, and that's what I expected to seek, but the truth of the matter is, there was a lawyer present, with Bonnie—

THE COURT: Well, I had indicated very strongly that anything about another indictment shouldn't be brought out in this case.

MR. SEGREST: I understand.

THE COURT: I don't know whether that's what you had in mind or not.

MR SEGREST: No, sir, it [sic] did not, and I don't have any idea of another indictment about that incident as far as this girl or anybody else right this minute. but what I am saying, it appears to me that—when Cornell testified, and anybody else testified to something that they are breaking the law, Mr. Bailey [attorney for Jerry Allen LeQuire] can ask every time whether it's a violation of law to tap phones, whether it's a violation—

THE COURT: Nobody has objected to your asking whether it's a violation.

MR. SEGREST: That's what I thought the objection was to.

THE COURT: The lawyer is not on trial here.

MR. SEGREST: No, sir.

THE COURT: So that's not—I didn't see the relevancy of that, but what I am saying is—

MR. SEGREST: Well, the remark she made, which was unresponsive and surprising to me, was there had been another indictment, there was an indictment in '83 and '84 against this—

THE COURT: I don't think—I did not think it was clear from her statement that she was talking about another indictment of Bonnie, but I am telling you to stay away from anything like that.

MR. SEGREST: Yes, sir.

It is apparent that the prosecutor had not, to this point in the trial, considered the issue of character evidence and the effect of calling to the attention of the jury an indictment unrelated to the case on trial.

Incident No. 4 took place while Karla Espinal, the principal witness for the prosecution was testifying (R. 14-1342-43). Prosecutor Segrest inquired as to

what Anders did for Jerry Allen LeQuire, to which question Karla Espinal replied, "She tapped phones." Then follows:

> Q. Okay. Now, did you ever discuss with Bonnie Sue Anders what her background was that would give her any expertise or facility to tap phones?
>
> A. Yeah, she worked for the phone company as a telephone repairman until she got fired when she got convicted on—
>
> Q. No, she got fired, right?
>
> A. Right.

(MOTION FOR MISTRIAL)

At the conclusion of that day's proceedings, in the absence of the jury, the argument on the mistrial motion was renewed, with the court again directing the prosecutor to instruct his witnesses to avoid any mention of a "conviction or anything else," and the prosecutor pleading lack of time to attend to this detail. While the court made no express

ruling, it is apparent that the motion for mistrial was denied as the court gave a curative instruction (R. 15-1387) to the jury.

The fifth and final incident with respect to the admission of evidence was Karla LeQuire's testimony as to her actions with respect to cocaine in 1986. She had testified that she had been getting her cocaine from Alvaro Palaez (R. 15-1466) but, not satisfied with that answer, Prosecutor Segrest inquired:

> Q. Did you also deal with anyone else?
>
> A. In the beginning, in 1986, when I started selling cocaine, it was—Bonnie and myself got into a business together to sell the cocaine.
>
> MR. FUGATE: Your Honor, I have a motion a the appropriate time.

* * * * * * * *

(IN CHAMBERS)

Prosecutor Segrest then stated that he expected Karla LeQuire to answer Hector Ramirez, and further said that he had warned the witness (R. 15-1467). The ridiculous part of this scenario is that, under any theory of extended conspiracy, such a conspiracy involving drugs had ended. Jerry LeQuire was arrested in August 1983 and, even with the planned escapes from the penal system, the conspiracy cannot continue forever. Bonnie Sue Anders was not charged with engaging in the drug business with Karla LeQuire in 1986, and Prosecutor Segrest's explanation that he was expecting a different name to be given is frivolous. Even Segrest admitted that the question to the witness was "too broad" (R. 15-1469).

[25] While the court gave another curative instruction to disregard the cocaine offense as stated by the witness (R. 15-1472), together with her entire answer, there can be no doubt that the character and past criminal offenses of Bonnie Sue Anders had been sufficiently planted in the minds of all the jurors to place her along with Jerry LeQuire in the illegal drug business. The able district judge repeatedly warned Prosecutor Segrest that a new trial would be forthcoming if he persisted. While Segrest professes ignorance and lack of any wrongful intention in his four instances of misconduct, the nature and persistence of his violation of the fundamental rule, embodied in Federal Rule of Evidence 404, that "the government may not rely on the accused's bad character to win a

conviction unless character has been put in issue by the defense," *United States v. Rodriguez*, 765 F.2d 1546 (11th Cir.1985), strongly suggest otherwise. When the additional violation of Rule 404 by another member of the prosecution team is also considered, there can be but one conclusion: the prosecutorial misconduct complained of in this case was so substantial as to permeate the overall fairness of Anders' trial.

The government contends that the curative instructions given by the trial court with regard to each instance of misconduct sufficiently protect Anders' rights (Brief of Appellee at 59). While it is true that instructions from the bench can cure isolated instances of prosecutorial misconduct, there are some matters that cannot be removed by curative

instructions; five instances reflecting on the character of Anders is more than enough to fall into the latter category. *See United States v. Reed*, 887 F.2d 1398, 1402 (11th Cir.1989) (instruction cured single instance of prosecutorial misconduct where "... the trial judge immediately issued a curative instruction and the *prosecutor thereafter desisted from any such remarks or references*") (emphasis added); *United States v. Nickerson*, 669 F.2d 1016, 1020 (5th Cir. Unit B 1982) ("[a]lthough in the instant case the prosecutor clearly acted improperly, *it was an isolated instance* which could be cured by such an instruction") (emphasis added). *See also United States v. Griggs*, 735 F.2d 1318, 1324 n. 3 (11th Cir.1984) ("We caution, however, that, although individually, each

comment may stem from a proper motive, in excessive cases, the sheer volume of such comments may warrant a finding of bad motive."); *United States v. Barshov*, 733 F.2d 842, 847 (11th Cir.1984), *cert. denied*, 469 U.S. 1158, 105 S.Ct. 904, 83 L.Ed.2d 919 (1985) (prosecutor's reference in his summation to "other people" was cured by district court's instructions to jury); *United States v. Drum*, 733 F.2d 1503, 1509 (11th Cir.), *cert. denied*, 469 U.S. 1061, 105 S.Ct. 543, 83 L.Ed.2d 431 (1984) (where defendant was acquitted on one of two charges before jury, the fact that nine objections to the prosecutor's rebuttal argument were sustained does not indicate that the prosecutor's statements had a prejudicial effect on the outcome of the case); and *United States v. Siegel*, 587 F.2d 721, 727 (5th Cir. 1979)

(prosecutor's improper statement in closing arguments was cured by district court's jury instructions.

Although any single instance of prosecutorial misconduct with regard to Anders may have escaped reversal, we are convinced that the sum of the errors in the case of Bonnie Sue Anders denied her the fair and impartial trial that she is entitled to under the law. Accordingly, we reverse and remand the case against appellant Anders for a new trial.

D. *James Thomas LeQuire*

[26] Appellant James Lequire argues that the failure of the district court to grant a mistrial when the prosecutor brought out a prior conviction, despite a prior court order that the conviction could not be used for impeachment, was

reversible error. We disagree and affirm the district court's ruling.

Prior to the trial, appellant submitted a motion *in limine* requesting that the prosecution refrain from making any references to his prior felony conviction since the conviction was untimely under Rule 609(b) of the Federal Rules of Evidence. This motion was granted. During trial, James LeQuire took the stand to testify on his own behalf. In direct contravention of the court's order, the prosecutor asked a question concerning the prior conviction. The defense counsel objected immediately and moved for a mistrial.

After denying the motion, the court gave the following curative instruction:

> When the last recess was called, the question had been asked about some offense that Mr. LeQuire had committed. The offense that he was

> talking about, the Court had already ruled it was a very trivial offense and it happened over twenty years ago and it was not admissible for any purpose. And so although there was no answer to the question, the question shouldn't have been asked in view of the ruling of the Court about the totally irrelevant relevance of some minor offense that occurred more than twenty years ago, so you are to just disregard the question.

(R. 8-2176). In *United States v. Rodriguez*, 765 F.2d 1546, 1559-60 (11th Cir.1985), the court noted that "our task is to determine the probable effect the improper comment had on the jury." In James LeQuire's case, any prejudice imparted on the jury by this single improper prosecutorial comment was removed by the comprehensive curative instruction given immediately thereafter. Consequently, such instruction was sufficient to render harmless any error caused by this misconduct. *United States v. Reed*, 887 F.2d 1398, 1402 (11th

Cir.1989), *cert. denied*, ____ U.S. ____, 110 S.Ct. 1136, 107 L.Ed.2d 1041 (1990). We, therefore, affirm the district court's denial of mistrial under these circumstances.

CONCLUSION

For the reasons enumerated in this opinion, we REVERSE and REMAND the conviction of Bonnie Sue Anders because of prosecutorial misconduct which denied her a fair trial. The convictions of Jerry LeQuire, James LeQuire, Charles LeQuire, Robert LeQuire, Harold Ward and Michael Jenkins are AFFIRMED.[23]

AFFIRMED in part, REVERSED in part, and REMANDED.

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[23]We have considered the appellants' other arguments but reject them as meritless. Thus, we affirm the district court's findings in all regards on these issues.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

UNITED STATES OF AMERICA	)	
	)	
vs.	)	
	)	CR. NO.
JERRY ALLEN LeQUIRE, et al	)	88-175-N
Defendants	)	

ORDER RE NOVEMBER 29 TRIAL

For the reasons set out below, defendant JERRY ALLEN LeQUIRE'S motion to dismiss the indictment is DENIED. Said motion is premised on the theory that Mr. LeQuire had entered a plea of guilty to two counts of a four-count indictment which was previously brought in this Court pursuant to a plea agreement reached with the United States Attorney's Office. Defendant asserts that it was an implicit part of the agreement that he would not be

subject to any further prosecution stemming from the incident which formed the basis for his guilty plea. Defendant argues that specific performance of this agreement may require the dismissal of the present indictment, and requests that the Court rule on his motion to dismiss at the conclusion of the Government's case. A hearing was held on October 20, 1988 at which time both the Government and counsel for defendant testified as to the circumstances surrounding the plea agreement. Based on that testimony and the record before the Court, defendant's motion must be denied.

At the change of plea hearing held on April 23, 1984, the Court stated its understanding that defendant LeQuire desired to change his plea from one of not guilty to one of guilty to counts two and

four of the indictment and that this change of plea was based on an agreement with the Government that if the court accepted his plea of guilty to counts two an four of the indictment that the court would dismiss counts one and three. Mr. LeQuire was then asked if this was his understanding. He answered: "Yes, sir." The Court then went over with defendant LeQuire the rights which he would be waiving by a plea of guilty and made the other statements and inquiries required by Rule 11 of the Federal Rules of Criminal Procedure. Prior to defendant LeQuire's establishing a factual basis for his plea, the United States Attorney stated that his office had "no other agreement with Mr. LeQuire other than his plea to counts two and four and that we will dismiss one and three after his plea is accepted." Thus

not only did the defendant acknowledge to the Court that the basis for his change of pleas was the agreement with the Government that two counts of the indictment would be dismissed, but the United States explicitly stated on the record that there was "no other agreement."

In defendant's memorandum of law in support of the motion to dismiss, defendant indicated that the above record was "false" in that it did not entirely present the plea agreement. At the October 20 hearing, defendant's attorney explained that such "falsification" was necessitated by the possible threat of retaliation should the "clients" of Mr. LeQuire believe that he was cooperating with the Government in any way. Defendant asserted, by way of sworn statement

attached to his motion, that had he been warned by anyone that despite his guilty plea he could still be charged at a later date with other offenses arising from the importation into Montgomery, Alabama of cocaine on August 3, 1983, he would not have pleaded guilty on April 23, 1984 to counts two and four of the indictment.

The court has no basis for disbelieving defendant LeQuire or his lawyers when they say they thought his plea agreement would free him from further prosecution, at least to the extent of acts which formed a basis for the charges in the indictment to which he was pleading guilty. However, their beliefs did not arise out of anything which was promised by the United States Attorney's office. The attorneys for the Government testified at the October 20 hearing that there was

no agreement other than that stated in the transcript of the hearing at which the Court accepted defendant's plea. Mr. DeMent, who was the only attorney for the defendant who spoke with the United States Attorney's office regarding the plea agreement prior to the time one was actually reached testified at the October 20 hearing: "I do not recall anybody saying that [there would not be any further prosecutions] specifically, but that went without saying, is the point I am trying to make." The testimony of the attorneys who represented the United States as well as the testimony of Mr. DeMent, leads the Court to conclude that the record at the April 23, 1984 hearing had not been "falsified" in any manner. Therefore, the United States Attorney's office has not breached the plea agreement

in any way by bringing the present indictment, and defendant's motion must be denied.

Defendant JERRY ALLEN LeQUIRE'S request for the recusal of the trial court is DENIED as MOOT. At the October 20, 1988 hearing the Court clarified its knowledge of the circumstances surrounding the plea agreement of April, 1984. Counsel for defendant conceded that the Court had not become a material witness and therefore the request was moot.

Counsel for defendants MIKE JENKINS, CHARLES LeQUIRE, GENE LeQUIRE, JAMES T. LeQUIRE, ROBERT LeQUIRE, and MICHAEL LeQUIRE has informed the Court that counsel no longer has any conflicting cases scheduled on or about November 28, 1988. Therefore, the defendants'

conditional motion to continue is DENIED as MOOT.

DONE and ORDERED this 18th day of November, 1988.

_____

UNITED STATES DISTRICT JUDGE

FILED

Nov 18 1988

CLERK U.S. DIST. COURT
MIDDLE DIST. OF AL.
DEPUTY CLERK, BY il

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 89-7155

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

CHARLES ALLEN LEQUIRE;
MIKE JENKINS;
JERRY ALLEN LEQUIRE, a/k/a
Richard Martin;
JAMES THOMAS LEQUIRE;
ROBERT LEQUIRE, a/k/a
Bob Martin;
BONNIE SUE ANDERS, a/k/a
Linda Hall, a/k/a Lynn Allen,
a/k/a Ann Black;
HAROLD E. WARD, a/k/a
Harold Hall,

Defendant-Appellants.

On Appeal from the United States District Court for the Middle District of Alabama

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC

Before: TJOFLAT, Chief Judge, Fay, Circuit Judge, and HOFFMAN*, Senior District Judge.

PER CURIAM:

(✓) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are Denied.

( ) The Petition(s) for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service

not having voted in favor of it, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

UNITED STATES CIRCUIT JUDGE

ORD-42
(9/91)

*Honorable Walter E. Hoffman, Senior U.S. District Judge for the Eastern District of Virginia, sitting by designation.

Filed with U.S. Court of Appeals for the Eleventh Circuit, March 4, 1992, Miguel J. Cortez, Clerk.